Supreme Court of the United States

October Term, 1944.

No. 570.

EDWARD A. HUNT and ROBERT A. HUNT, Co-Partners Trading as Hunt's Motor Freight and Food Products Transport,

Petitioners,

vs.

EDWARD CRUMBOCH, President, JOSEPH E. GRACE, Secretary-Treasurer, WILLIAM F. KELLEHER, International Vice-President, Business Agent and Trustee, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Brief for Respondents

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CITATIONS.

CASES:

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 51-54) is reported in 143 F. 2d 902.

The opinion of the District Court (R. 42-50) is reported in 47 Fed. Supp. 571.

JURISDICTION.

The judgment of the U. S. Circuit Court of Appeals was entered on July 12, 1944 (R. 55).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

STATEMENT.

The Statement made by the petitioners is correct except as noted below.

COUNTER "STATEMENT OF THE CASE."

The question involved in this case is whether or not under the Anti-Trust laws of the United States a labor union can be held liable to an employer for losses sustained by the employer in the conduct of an interstate trucking business merely because the labor union for good and sufficient reasons refused the employer's request to be supplied with motor truck operators from the membership of the union, particularly in view of the fact that the union is not shown to have entered into any combination with any

competitor of the employer or with any other person or that the union has resorted to any seizure of or damage to the employer's property and acted for the sole purpose of accomplishing a legitimate labor objective and with no intent to interfere with the transportation of any goods.

COUNTER STATEMENT OF "THE ESSENTIAL FACTS."

There is no proof to support petitioners' statement (p. 3) that "other contract haulers" attempted to operate their trucks during the union strike against the A & P.

Petitioners omit stating (p. 3) that Edward Crumboch, the manager and person in complete charge of the defendant union, testified in substance and effect, that the reason for the union's refusal to contract with petitioners was that the union believed that one of the petitioners had shot and killed a member of the union (R. 36).

The statements (p. 3) that the union was "actuated by resentment and hatred" and that it acted "out of motives of revenge" are inferences and conclusions not supported by the evidence.

The fair implication of the evidence is that the union declined to contract with the petitioners because of the belief that the affairs of the union might become disorganized if persons of the character of petitioners were recognized as proper union associates. In short, the implication of the evidence is that the union acted not for purposes of revenge but for the purpose of safeguarding its own interests.

Petitioners assume (p. 3) that respondents "conspired". There is no proof in this record of any conspiracy. It may be noted at this time that throughout petitioners' brief this assumption of the existence of a conspiracy occurs many times.

Counter Statement of "The Essential Facts"

At page 5 petitioners state that respondents "forced" the A & P to "breach" its hauling contract with the petitioners. There is no evidence in this case that respondents ever resorted to the use of any *force*. The proofs show merely that the representatives of the union notified the A & P that the union would not enter into a closed-shop contract with it unless it was understood that petitioners were to be dropped from the group of contract haulers with whom the union intended to negotiate for the sale of the services of its members. Moreover, the evidence does not show that the contract between petitioners and the A & P Company was *breached*. On the contrary, the petitioner, Robert A. Hunt, testified that the contract ran only to March 10, 1939 (R. 21) and the trial court found as a fact that the contract was terminated as of that date (R. 44—16th Finding of Fact).

Also at page 5 petitioners state that respondents "*forced*" the Sterling Supply Co. to take its work away from the petitioners by "threats" of trouble.

As above stated the evidence does not show that the use of force was resorted to at any time or place and in addition the record does not show that any threats were ever made by any of the respondents. All that is shown is that the union notified the Sterling Supply Co. that its members would not work for it if it contracted work with petitioners.

Also at page 5 petitioners state that "A & P's forced cancellation of the hauling contract with petitioners interfered with its ability to handle its goods in interstate commerce." This statement is unsupported by any evidence. There is nothing in the record to show that any goods whatsoever were stopped or delayed in the process of transportation. In fact in this regard the trial Judge found the facts to be as follows (18th Finding of Fact, R. 44):

> "18. The elimination of the plaintiff's services did not in any manner affect the interstate operations of A & P or the Sterling Supply Company."

Under the heading "Features of Opinion Below" (p. 6) petitioners state that "in the instant case a labor dispute was not involved and labor objectives were not being sought (R. 48)." That is a statement of conclusions contrary to the evidence. The fair implication of the proofs is that the union acted as a result of the existence of a labor dispute and sought legitimate labor objectives.

At page 7 petitioners assume that the Court below concluded that respondents planned the destruction of petitioners' business. The Court below made no such conclusion and moreover there is no evidence in the record to support such a conclusion.

ARGUMENT.

Summary of Essential Facts.

The Petitioners' claim is based solely on the negative fact that the respondent labor union has refused, for reasons duly stated, to enter into contractual relations with the petitioners—particularly a contractual relationship whereby the petitioners would agree to employ only members of the union and the union would admit petitioners' non-union employees to membership in the union, or would supply petitioners with a sufficient number of union members to operate their motor trucks.

In other words, the union has—and has only—declined to enter into a closed-shop agreement with the plaintiffs.

The union's reasons for thus declining to contract with petitioners were that petitioners had theretofore refused the union's requests for such a contract, had opposed the union's efforts to unionize petitioners' principal employer —the A & P—and finally had shot and killed a union member.

Moreover, the record shows that petitioners' present will-

ingness to employ union members in their business arises solely out of the fact that petitioners' said principal employer, the A & P, has entered into a closed-shop agreement with the union.

So long as the A & P operated on an open-shop basis, the plaintiffs would have nothing to do with the union. During that period they not only refused the union's overtures to enter into a closed-shop contract but they opposed and fought the union generally, and they so conducted themselves as practically to invite or challenge the union to do its utmost. They evidently thought that the A & P would never "go union", and that therefore they could defy and antagonize the union with complete safety to themselves. But, as aforesaid, there came a time when the A & P *did* "go union", and then the plaintiffs discovered that *they* needed the *union* because without union connections they could not continue to work for A & P. So then the plaintiffs reversed their attitude, and quickly signified their willingness to make that contract with the union which theretofore they had so flatly refused to consider.

Under such circumstances, the petitioners now come into court and say that the union has no lawful right to refuse to contract with them. They claim that they had the right to refuse the union overtures for a contract but they deny that the union has the right to refuse the same overtures when made by them.

In footnote 28 in the Apex decision[1] Mr. Chief Justice Stone summed up this proposition most succinctly and we feel it is squarely applicable to the case at bar (310 U. S. 513):

> ". . . it seems obvious that the Sherman Act cannot be said to subject employees to a liability which it does not impose on employers or others."

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[1] Apex Hosiery Co. v. Leader, 310 U. S. 469, 84 L. ed. 1311, 60 S. Ct. 982.

It is significant that the petitioners are the only members of their group with whom the union has refused to contract. Prior to the making of a closed-shop agreement with the A & P there were twenty-five contract haulers in the same position as plaintiffs. That is to say, including the petitioners, there were twenty-five contractors employing non-union drivers, and hauling under contract for the A & P. And when the A & P decided to adopt a closed-shop policy, the union forthwith entered into closed-shop agreements with all of these contractors except the petitioners. The *reason* for this was that although all the contractors had opposed the union they all had fought legitimately *except the* petitioners. None except the petitioners had resorted to such excessively antagonistic practices. On this record it is safe to say that the union has no intent or desire to exert any influence on the competitive relations between haulers of goods for the A & P. Such an inference might conceivably be drawn if it could be shown that the union had acted arbitrarily, but no such inference is permissible when as here, it is shown that the union's policy is based on specific reasons.

Summary of Argument.

On the facts of this case no liability can be asserted against the union under the Anti-Trust laws.

With respect to cases of this kind the last word on the subject is to be found in the leading case of *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 84 L. ed. 1311, 60 S. Ct. 982. In that case the defendant labor union attempted to compel a corporation engaged in manufacturing hosiery to agree to a closed-shop contract. The company was unwilling to negotiate and as a result the union, principally non-employees of the company, seized and held possession of the company's entire plant and its contents by the means of a sit-down strike and with the use of force and violence.

As a result of this unlawful seizure the company was prevented from shipping substantial quantities of hosiery which had been completely manufactured and which were ready for shipment in interstate commerce under orders actually on hand.

This Court held that notwithstanding the unlawfulness and actual criminality of the defendant union's conduct, no liability could be asserted against the union under the Sherman Anti-Trust Act and its amendments.

We submit that it follows as of course that a similar conclusion must be reached in this case. In the case at bar the defendant union committed none of the wrongs which were committed by the union in the Apex case and everything that was said in favor of the union in the Apex decision is at least as applicable to the respondents in this case.

Analysis of the decision in the Apex case discloses that the four points of fact principally urged against the union were as follows:

A—The union seized and held possession of the employer's property.

B—The union resorted to the use of force and violence.

C—The union actually prevented transportation in interstate commerce of a substantial quantity of goods.

D—The union intended to restrain interstate commerce in the sense that it specifically intended to stop or delay the shipment of specific goods in interstate commerce.

The points of law which were enunciated in the Apex decision as having the effect of exonerating the union were as follows:

I. In cases of this kind (that is cases involving the liability of labor unions for alleged restraints on commerce as a result of refusing to work for a particular

employer) no violation of the Sherman Act is established unless it is shown that the conduct of the union resulted in actual interference with the transportation of goods in such a substantial quantity as to effect the market price.

II. Under the Sherman Act only such restraints are actionable as were deemed unreasonable at common law.

III. Section 6 of the Clayton Act was intended to give labor unions at least partial immunization with respect to the Anti-Trust laws.

IV. Section 20 of the Clayton Act was intended to give labor unions additional immunization with respect to the Anti-Trust laws.

V. The Sherman Act was not intended as a means of policing interstate commerce.

The foregoing points (A to D and I to V) will be considered seriatim.

Point A.

The Apex Defendants Seized and Held Employer's Property.

No contention is made that the respondents ever interfered in any way with any of the petitioners' property. In other words, respondents did not seize any of the petitioners' motor trucks or any other equipment or property, and neither damaged nor sought to damage any property. As aforesaid, all that was done by the respondent labor union in the case at bar was merely *to refrain* from entering into any relationship whatsoever with the petitioners. The petitioners' claim is based on the union's acts of omission as distinguished from acts of commission.

Moreover, as mentioned in the summary of the facts, *supra*, the union's refusal to act was no more than a coun-

terpart of a refusal to act previously made by the petitioners. That is to say, in point of time it was the union who first sought to effectuate a closed-shop agreement with the petitioners and when the union first made overtures the petitioners summarily rejected them. Therefore, from the worst point of view the union did nothing that the petitioners themselves had not theretofore done.

Point B.

The Apex Defendants Used Force and Violence.

It is necessarily obvious from the foregoing that the respondent union in this case did not resort to any force or violence. The respondents inflicted no damage on any of petitioners' trucks or other property. Obviously therefore, this and other circumstances make the respondent union in this case appear in a more favorable light than the union in the Apex case.

Point C.

The Apex Defendants Actually Prevented Transportation of Goods in Interstate Commerce.

In the case at bar the respondent union in no way interfered in the transportation of any goods whatsoever. Under the facts, of course, the only goods which *could* have been interfered with were the goods of the A & P and the Sterling Supply Company and no contention is made that the transportation of any of those goods was either stopped or delayed. In other words, the A & P simply used other trucks (either its own or those of another contract hauler) to replace petitioners' trucks and the Sterling Supply Co. did

likewise. The net result was no interference with or restraint on interstate commerce whatsoever.

Point D.

The Apex Defendants Intended to Restrain Interstate Commerce.

Finally, and still comparing the case at bar with the Apex case, the respondent union here had no *intent* to interfere with or restrain interstate commerce. Here it is obvious that the real primary and essential intent of the union was the mere negative one of not entering into any kind of relationship with the petitioners particularly a relationship involving the use by petitioners of the services of the union's membership. It may be, as one of the union employees is alleged to have said, that the union was not too greatly upset about the possibility, if not probability, that the effect of depriving petitioners of the services of union members would be to force the petitioners to go out of business (R. 22). But certainly it is clear under all the evidence that such considerations were purely incidental. It is plain that the union's intent was to adhere to its hands-off policy with respect to the petitioners no matter what effect that policy might appear to have on petitioners' business.

The question next arises why did the union have any such intent? And the answer is that the union believed that the same was necessary to its continued peaceful and orderly existence. It may be fairly argued from the evidence that the union considered it actually unsafe and dangerous to permit its men to work for an employer who had actually shot and killed a union member against the background of a labor strife.

Even if it be assumed that the union contemplated and

intended the complete destruction of the petitioners' business, it does not follow as a matter of law and fact that the union intended to impose any restraint on commerce. The distinction involved was pointedly made by this Court in the opinion rendered in the Apex case in connection with discussing the first Coronado Coal Co. case.[2]

In the Coronado Coal Company case the employer was engaged in the business of mining coal largely distributed in interstate commerce and the defendant union not only imposed restraint on commerce by interrupting the mining of the coal but actually burned a number of cars loaded with coal and billed for interstate movement. The petitioners try to argue here, as the theory was advanced there, that the union by interfering with coal loaded for interstate shipment must have intended to interfere with interstate commerce. In support of this contention U. S. vs. Patten, 226 U. S. 525; 33 S. Ct. 141 is cited. In the Coronado Coal case, however, the court held that although, of course, those acting for the union intended to destroy the coal it did not necessarily follow that they had any intent with respect to commerce and the thought was expressed by Mr. Chief Justice Stone in the Apex opinion as follows (310 U. S. 509):

> "the intent to obstruct the mining of coal and to burn the loaded cars, did not necessarily imply an intent to restrain the commerce, although concededly interstate shipments and the filling of interstate orders for coal were necessarily ended by the stoppage of mining operations and the destruction of the loaded cars."

The fact that the respondent union adopted a hands-off policy only with respect to the petitioners shows that the union had no intent to interfere with commerce as aforesaid. The fact is, that the petitioners were only one of a

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2 United Mine Workers of America, et al v. Coronado Coal Co. et al, 259 U. S. 344, 66 L. ed. 975, 42 S. Ct. 570.

group of twenty-five contract haulers all of whom transported goods for the A & P and as petitioners concede, immediately after the A & P agreed to enter into a closed-shop relationship with the union, the union voluntarily entered into working agreements with all of the contract haulers in the group, except the petitioners. If the union had had any scheme or intent really to interfere with commerce they would have done more than to take action against just one of a group of twenty-five.

Point I.

No Liability Attaches Under the Sherman Anti-Trust Act Unless It Be Shown That There Was An Interference with Interstate Commerce So Substantially As to Affect Market Prices.

The principal of law above stated was expressed in the opinion in the Apex case as follows (310 U. S. 495, 496):

> ". . . this Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services and finally this Court has refused to apply the Sherman Act in cases like the present . . . in which it was shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way. First Coronado Coal Co. Case, 259 U. S. 344, 66 L. ed. 975, 42 S. Ct. 570, 27 A.L.R. 762, supra; United Leather Workers International Union Case, 265 U. S. 457, 68 L. ed. 1104, 44 S. Ct. 623, 33 A.L.R. 566, supra; Levering & G. Co. v. Morrin, 289 U. S. 103, 77 L. ed. 1062, 53 S. Ct. 549."

(310 U. S. 500, 501):

"In the cases considered by this Court since the Standard Oil Co. Case in 1911 some form of restraint of commercial competition has been the sine qua non to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. Board of Trade v. U. S., 246 U. S. 231, 238, 62 L. ed. 683, 687, 38 S. Ct. 242, Ann. Cas. 1918D 1207; U. S. v. U. S. Steel Corp. 251 U. S. 417, 64 L. ed. 343, 40 S. Ct. 293, 8 A.L.R. 1121; Cement Mfrs. Protective Asso. v. U. S., 268 U. S. 588, 69 L. ed. 1104, 45 S. Ct. 586; U. S. v. International Harvester Co. 274 U. S. 693, 71 L. ed. 1302, 47 S. Ct. 748; Appalachian Coals v. U. S., 288 U. S. 344, 375 et seq. 77 L. ed. 825, 837, 53 S. Ct. 471."

(310 U. S. 506):

"It will be observed that in each of these cases where the Act was held applicable to labor unions, the activities affecting interstate commerce were directed at control of the market and were so wide-spread as substantially to affect it."

As previously pointed out the respondent labor union in this case did not interfere with the transportation of any

goods whatsoever. We know of no better way of expressing the real facts in the present case than in the very words of Mr. Chief Justice Stone in the Apex case (310 U. S. 503, 504):

> "Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act: Appalachian Coals v. U. S., supra (288 U. S. 360, 77 L. ed. 828, 53 S. Ct. 471). Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see American Steel Foundries v. Tri-City Cen. Trades Council, 257 U. S. 184, 209, 66 L. ed. 189, 199, 42 S. Ct. 72, 27 A.L.R. 360, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. See Levering & G. Co. v. Morrin, 289 U. S. 103, 77 L. ed. 1062, 53 S. Ct. 549, supra; cf. American Steel Foundries Case, supra (257 U. S. 206, 66 L. ed. 199, 42 S. Ct. 72, 27 A.L.R. 360); National Asso. of Window Glass Mfrs. v. U. S., 263 U. S. 403, 68 L. ed. 358, 44 S. Ct. 148. *And in any case, the restraint here is, as we have seen, of a different kind and has not been shown to have any actual or intended*

effect on price or price competition." (Emphasis supplied.)

We can find no answer to all this in petitioners' brief. Apparently, petitioners did not dispute the rule of law that, at least in a case of this kind, no recovery can be had under the Sherman Act unless it be shown there is a substantial interference with the transportation of goods. However, the petitioners seem to claim that a trucking company is exempt from this requirement, although we fail to find in their brief and elsewhere any authorities that bear out this contention. There are, we submit, no authorities and no reasons for making any distinction between the business of manufacturing hosiery for interstate shipment and the business of operating trucks or trains which carry such hosiery.

The petitioners make reference to the fact that the ultimate outcome of this controversy was the ruin of their business and that the union has been responsible for the removal of a competitor from the field of motor truck haulers. Of course, that is true, but petitioners cite no authority for the proposition that merely because an interstate hauler of goods fails in business he has a right of action against someone under the Sherman Act and even if the mere fact of the removal of one competitor from the field were material, it is still a fact that this particular competitor owned and operated such an insignificant number of trucks that his going out of business is wholly negligible and immaterial. Certainly, the petitioners cannot successfully argue that their going out of business has had, or could possibly have, any effect on the prices paid for the services of motor truck haulers.

The facts may be briefly repeated. Petitioners owned and operated seven trucks and they were but one of a group of twenty-five motor truck haulers all of whom worked under contract with the A & P and the A & P operated many trucks of their own. Thus, without even com-

paring the number of petitioners' trucks with the total number of trucks in operation throughout the country, it is plain that merely in comparison to the number of trucks operated by the A & P the number of petitioners' trucks were negligible, and as a matter of fact, the petitioners utterly failed to prove that their removal from the field resulted in any change in the prices paid by the A & P to the remaining twenty-four truck haulers.

The petitioners argue that in the Apex case the restraint on commerce was *indirect*, whereas in the case at bar there was a *direct* restraint.

The fact is that the restraint in the Apex case was as *direct* as possible and that there was no restraint at all in the case at bar, direct or indirect.

The directness of the restraint in the Apex case is beyond question. Passing consideration of the interference with the *manufacture* of goods, the evidence in the Apex case showed that there were substantial quantities of completely manufactured hosiery actually ready for interstate shipment, and all that was necessary to transport the goods was, that the sit-down strikers permit them to be taken out of the plant. The strikers refused to give that permission.

In the case at bar, as aforesaid, nothing done or left undone by the respondent union had any effect at all on the transportation of anything whatsoever.

The petitioners do not dispute that fact but they argue that some great significance should be attached to the fact that they were engaged in a *transportation* business as distinguished from a manufacturing business and that therefore some special rule should apply to this case. Their argument seems to be that transportation companies are to be regarded as sacrosanct or at least that in a case where a transportation company is involved it is not necessary to show that actual transportation was in fact affected. In other words, petitioners seem to argue that interference with a transportation business must necessarily affect transportation. Of course, that is obviously not so. For

example, the particular transportation business effected may be a wholly superfluous one. For instance, in any particular locality there may be less material to transport than there are transportation companies to transport it, so that one or more companies may be eliminated without having any effect at all on actual transportation. Indeed that is precisely the situation presented here. The evidence shows, as aforesaid, that the petitioners were one of a group of twenty-five contract haulers who worked exclusively in transporting the goods of the A & P and it is an established fact that the removal of the petitioners from that group had no effect at all on the A & P's ability to proceed with the moving of its goods.

It follows therefore that the mere fact that the complainant in a case under the Sherman Act is a transportation company is of no vital significance.

Of course it is obvious that in all cases under the Sherman Act or under any act based on the commerce power of Congress it must be shown that the business involved in the case relates to commerce in the sense that it is in the field of commerce and it is plain that a transportation business from its very nature appears more closely related to commerce than does a manufacturing company. But the only point in comparing the nature of the business involved is to determine whether or not it relates to commerce and when once an affirmative conclusion is reached on that question the distinction is no longer of any significance and all other tests apply.

Point II.

Under the Sherman Act Only Such Restraints Are Actionable As Were Deemed Unreasonable and Undue at Common Law.

In the opinion rendered in the Apex case the Court pointed out that beginning at the latest with the Standard

Oil Co. Case (Standard Oil Co. v. U. S., 221 U. S. 1, 55 L. ed. 619, 31 S. Ct. 502) the Sherman Act has been construed by this Court as meaning that the only restraints prohibited thereby are restraints which were deemed unreasonable or undue at the common law. In other words, this Court from an early period formulated the so-called "rule of reason" and has applied it ever since in its application of the Sherman Act.

The opinion in the Apex case clearly shows that the Court deemed the application of the "rule of reason" applicable to cases of this kind. For instance, after referring to the Duplex Printing Company case[3] and the Bedford Cut Stone Co. case[4] in connection with a discussion of the "rule of reason" the Court said (310 U. S. 507):

> "The applicability of that rule to restraints upon commerce effected by a labor union in order to promote and consolidate the interests of its union was not considered."

Thus the Court, at least tacitly, implied that if the rule of reason had been considered in the decision of those cases the result might have been different.

Accordingly, we submit, that regardless of other considerations the application of the rule of reason in this case should result in an affirmance of the judgment below. From the point of view of the extent or amount of the restraint on commerce involved in this case, if any, the same certainly cannot be said to be unreasonable or undue. As previously stated in this brief, we assert that there has been no restraint whatsoever, but even if it be assumed that the fact that the petitioners were forced out of business be in itself a restraint on commerce, the actual effect

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[3] Duplex Printing Press Co. v. Deering, 254 U. S. 443, 65 L. ed. 349, 41 S. Ct. 172.

[4] Bedford Cut Stone Co. v. Journeymen Stone Cutters Asso., 274 U. S. 37, 71 L. ed. 916, 47 S. Ct. 522.

of it has been shown to be so slight and insignificant that it surely cannot be said to be unreasonable.

From the point of view of acting because of reasons as distinguished from arbitrarily, there can be no question that the respondent should be exonerated. As has been previously pointed out the conduct of the respondents was anything but arbitrary. Respondents have specifically stated that their reasons for acting as they did—or rather for refusing to act as petitioners wanted them to act—were that (1) the petitioners themselves at first refused to do the very same thing that the respondents later refused to do and (2) the petitioners after having first tried to frustrate a strike called by the union against a third person, namely, the A & P, resorted to violence and one of them actually shot and killed a union member.

It is obvious that this case would never have arisen were it not for the existence of these reasons. As has been previously shown, the respondents took no action whatsoever again any other contract hauler in petitioners' group. Therefore, petitioners argument that if this case is sustained the Court will be permitting or at least authorizing this union and others to assume some sort of control over interstate commerce, by deciding which contract haulers shall be afforded operators and which shall not, is unsound. The respondents assert no right to refuse in the future to enter into closed-shop agreements with other contract haulers except under circumstances similar to those in the case at bar. In other words, the only proposition we assert is that a labor union has a right to refuse to do business with a potential employer for good and sufficient reason.

Petitioners inaptly argue in this connection as follows (R. 13):

> " . . . [the lower] court placed the stamp of its approval upon a practice which eliminates a competitor from a particular field in commerce, upon the ground

> that there are plenty of others left to handle the business and to take over the work performed by the ousted competitor. Extend this principle and competitors may with impunity be removed from the field one by one, and the business swallowed up by the single remaining giant which has conspired with others to destroy them, and which remains to dominate the field. This is, in fact, the exquisite formula for monopoly."

This argument would not necessarily be unsound if there were any facts to support it. As aforesaid, all the facts are to the contrary. The union here has not conspired with any of petitioners' competitors; there are no facts in the record tending to show any intent to enter into any such conspiracy in the future, and there is nothing in the opinion of the Court below indicating any right in the union so to act. All that the opinion below stands for is that the union, acting *alone*, had the right to adopt a purely negative "hands off" policy with respect to petitioners because of specific reasons duly stated, and that is a far cry from saying that the union may combine with employers in order so to eliminate competing employers so that one or more of them may be able to "dominate" or "monopolize" the field. There is not only nothing in the record to show that the union has any plan or intent to eliminate any other contract hauler in petitioners' group, but, as aforesaid, the evidence actually shows affirmatively that there is no such intent in that it is an admitted fact that the union has already entered into closed-shop agreements with every other hauler. In other words, the proofs affirmatively show that the union has no intent to exert any influence on the competitive conditions existing among contract haulers, and the petitioners' unwillingness to face the facts is indicative of a consciousness of weakness in their position before this Court.

Point III.

The Respondent Labor Union Is Afforded Immunity Under Section 6 of the Clayton Act.

Apart from the foregoing, the Clayton Act, amending the Sherman Act, provided for special exceptions applicable to labor unions only.

Thus, in section 6 of the Clayton Act, Congress enacted as follows:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C.A. 17, Oct. 15, 1914, c. 323, sec. 6, 38 Stat. 731.

It is therefore clear that under the law the combination of the individual respondents as officers of the respondent labor union cannot be regarded as a conspiracy.

In the opinion rendered in the Apex case this Court, after quoting the foregoing, said (310 U. S. 503):

> ". . . it would seem plain that restraints on the sale of the employees services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act."

It is clear therefore that the petitioners in their brief misstate the case when they assert, as they so frequently do, that a conspiracy exists in this case.

We submit that there is no proof of any conspiracy. Under the above quoted statute the fact that the individual respondents combined together in the representation of a labor union cannot be said to be a conspiracy and as previously pointed out it is obvious that the union has not combined with any other persons or interests so as to bring it within the rule of the case of U. S. v. Brims, 272 U. S. 549, 71 L. ed. 403, 47 S. Ct. 169.

Point IV.

The Respondent Labor Union Is Afforded Immunity Under Section 20 of the Clayton Act.

In addition to the exemptions set forth in section 6 of the Clayton Act additional immunization is given labor unions in section 20 of that Act. That section provides as follows:

> "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation to employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*" 29 U.S.C.A. 52, Oct. 15, 1914, c. 323, Sec. 20, 38 Stat. 738. (Emphasis supplied.)

This section of the Clayton Act was referred to, by this Court, in the opinion rendered in the Apex case in footnote 26 (310 U. S. 507). Of course, this section of the Clayton Act was less applicable to the facts of the Apex case than section 6 of that Act.

With respect to section 20, however, this Court took occasion to point out that that section was held inapplicable in both the Duplex Printing Press and the Bedford Cut Stone Glass Company cases, (*supra*) because it held to apply only "to actual dispute between an employer and his employees with respect to the terms or conditions of their own employment and did not extend to acts of labor unions

beyond the product of an employer by whom they were not employed".

It is obvious, therefore, that both these cases are distinguishable from the case at bar. Here, there is an actual dispute between an employer of labor and a local union of employees, whose services are sought by the employer, and in this case, there is no suggestion of "boycotting the product of an employer by whom they (respondents) were not employed".

We submit that even independent of section 20 of the Clayton Act no court has ever considered that the Sherman Act could be invoked to prevent the members of a labor union from doing no more than peaceably declining to work for an employer who wanted to hire them. The right of any man peaceably to refuse to work for another has never been challenged under any law except in the time of national emergency. Therefore, all that section 20 of the Clayton Act really amounts to is a reaffirmation of that principal with an additional safeguard of the right of workingmen so to act even in combination with each other.

This is the "present public policy of the United States" Mr. Justice Frankfurter said in the recent case of *United States vs. Hutcheson*, 312 US 219, 85 L. ed. 788.

In his opinion, Mr. Justice Frankfurter makes it clear that this public policy, promulgated by the Norris-LaGuardia Act, greatly widens the scope of section 20 as applied previously by the Duplex Printing Press and Bedford Cut Stone cases (*supra*) and it makes no difference for what purpose the union acted, so long as that purpose was one of self-interest. (312 U. S. 232)

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

It is true that in both the Duplex Printing Press and the Bedford Cut Stone cases (*supra*) this Court held, that in order for section 20 of the Clayton Act to apply, it must be shown that the union acted in pursuance of a legitimate labor objective but the force and effect of those decisions were at least greatly modified by the decision rendered in the Hutcheson case (*supra*) in which there was no dispute whatsoever between the complainant and the union. Moreover, we submit that the Hutcheson case (*supra*) supersedes and perhaps overrules in all respects the Duplex Printing Press and Bedford Cut Stone cases (*supra*) on the applicability of the sections 6 and 20 of the Clayton Act.

This Court's decision in the Hutcheson case appears at least to leave the question open but does indicate that a legitimate labor objective is not a condition precedent to rendering section 20 of the Clayton Act applicable. In his concurring opinion, in the Hutcheson case (*supra*) Mr. Chief Justice Stone said (312 U. S. 239):

> "The legality of the alleged restraint under the Sherman Act is not affected by characterising the strike, as this indictment does, as 'jurisdictional' or as not within the 'legitimate object of a labor union'."

Be that as it may, it is submitted that the respondents here have certainly acted in pursuance of a legitimate labor objective. Petitioners place entirely too narrow a construction upon the definition of legitimate labor objective. The theory has long been discarded that "legitimate labor objective" has reference only to wages, hours, and the other elements which are called working conditions. In a very recent case, the 7th Circuit Court of Appeals in the Albrecht v. Kinsella, 119 F. 2d 1003, 1004 and 1005, said:

> "The test [of a legitimate labor objective] is whether the activity complained of is one promotive of, and within the scope of, the legitimate objects of a labor

union or whether the union is being misused by those holding official position or positions of trust therein, who, conspiring for their private and their personal profit, are using the union name to obtain immunity from Sherman Act prosecutions and at the same time shield their misconduct behind an organization whose fair name and activities are likely to mislead a court or jury as well as the public."

Moreover, it is submitted that a reading of section 13 of the Norris-LaGuardia Act (29 U. S. C. A. 113), particularly as quoted by the Supreme Court in the Hutcheson case (*supra*) leaves no doubt that a legitimate labor objective is present where a union acts as such in pursuance of a proper and reasonable self-interest.

It would seem abundantly clear that the consideration of a closed-shop agreement, no matter how ultimately determined, is a legitimate objective, and is definitely within the scope of legitimate union activity, and it would be absurd to argue that the union would be without discretion—in its own self-interest—to act upon such contracts as it sees fit.

Point V.

Sherman Act Was Not Intended As a Means of Policing Interstate Commerce.

With respect to this point, the opinion rendered in the Apex case contains the following (310 U. S. 490):

> "The legislative history of the Sherman Act as well as the decisions of this Court interpreting it, show that it was not aimed at policing interstate transportation or movement of goods and property."

It is evident throughout the opinion that as a result of this rule no matter how criminal the conduct and even if

instrumentalities of commerce are involved the Sherman Act is not always applicable. Therefore, it is just another statement of the rule that the Sherman Act was not intended to prevent all restraint of interstate commerce.

Applying the rule to this case, therefore, it follows that even had the defendants resorted to such violent and criminal acts as damaging or destroying the petitioners' trucks there would still be no liability under the Sherman Act.

We have previously discussed the fact that even though petitioners were in the transportation business that the general application of the Sherman Act is not changed. This appears to us to be self-evident. This obviously is not the law and has never been the law.

The Apex decision has been applied in numerous subsequent cases, illustrative of which is *United States v. Local Union 807*, etc., 118 F. 2d 684. In that case the members of a union of motor truck drivers were indicted both under the Sherman Act and the Federal Anti-Racketeering Act. The facts, as subsequently stated by this Court (315 U. S. 521, 86 L. ed. 1004) were as follows (86 L. ed. at pages 1007-08):

> "The proof at the trial showed that the defendant Local 807 includes in its membership nearly all the motor truck drivers and helpers in the city of New York, and that during the period covered by the indictment defendants Campbell and Furey held office in the Local as delegates in charge of the west side of Manhattan and the other defendants were members. Large quantities of the merchandise which goes into the city from neighboring states are transported in 'over-the-road' trucks which are usually manned by drivers and helpers who reside in the localities from which the shipments are made and who are consequently not members of Local 807. Prior to the events covered by this indict-

ment, it appears to have been customary for these out-of-state drivers to make deliveries to the warehouses of consignees in New York and then to pick up other merchandise from New York shippers for delivery on the return trip to consignees in the surrounding states. There was sufficient evidence to warrant a finding that the defendants conspired to use and did use violence and threats to obtain from the owners of these 'over-the-road' trucks $9.42 for each large truck and $8.41 for each small truck entering the city. These amounts were the regular union rates for a day's work of driving and unloading. There was proof that in some cases the out-of-state driver was compelled to drive the truck to a point close to the city limits and there to turn it over to one or more of the defendants. These defendants would then drive the truck to its destination, do the unloading, pick up the merchandise for the return trip and surrender the truck to the out-of-state driver at the point where they had taken it over. In other cases, according to the testimony, the money was demanded and obtained, but the owners or drivers rejected the offers of the defendants to do or help with the driving or unloading. And in several cases the jury could have found that the defendants either failed to offer to work or refused to work for the money when asked to do so."

The defendants were convicted under both statutes and they appealed to the Circuit Court of Appeals for the Second Circuit. That Court reversed, and with respect to the conviction under the Sherman Act said:

"The convictions under the Sherman Act cannot stand after the decision of the Supreme Court in Apex Hosiery Co. v. Leader . . . We have very recently considered the application of the doctrines there laid down in United States v. Gold . . . and what we there

said will serve here as well; for there was no evidence of any concerted agreement to fix the price of trucking or of the commodities carried; nor was there any evidence that the action of the accused had in fact affected those prices."

The dissenting Judge, Augustus N. Hand, in this connection, said (p. 689):

> "I agree that the convictions for violation of the Sherman Act should be reversed for the reasons stated in the majority opinion."

The Government appealed the reversal of the conviction under the Anti-Racketeering Act, but did not appeal in the Sherman Act phase of the case (315 U. S. 521, 86 L. ed. 1004). This Court affirmed the judgment and, therefore, the case is authority for the proposition that even in a case where the very instrumentalities of interstate commerce are involved, the rule of the Apex case is followed. That is to say, the activities of a defendant labor union affecting interstate commerce must be directed at control of the market and must be so widespread as substantially to affect it.

Cases Relied On By Petitioners.

Petitioners have cited no case even remotely tending to support their proposition that a labor union's mere refusal to enter into contractual relationship with a potential employer subjects the union to liability under the anti-trust laws, and all of the cases relied on by petitioners are readily distinguishable on their facts.

In the case of *Anderson vs. Shipowners Association, etc.*, et al., 272 U. S. 359, 71 L. ed. 298, 47 S. Ct. 125, the defendants consisted of an association of shipowners who had

conspired to regulate the employment of seamen for service on ships moving in interstate commerce. As previously stated, one of the determining facts of the case at bar is that the respondent labor union did not act in combination with any one. Moreover, there is nothing in the opinion rendered in this case to support the proposition that a business engaged in operating vehicles of commerce stands on any footing different from any other business engaged in interstate commerce. For example, as is shown by the quotation of the opinion which appeared on page 16 of the respondent's brief, what this court said was that ships are within the commerce clause "*no less than cargo.*"

The opinion rendered in the case of *Williams vs. United States*, 295 Fed. 302, would appear at least at first blush to be inconsistent with the well-settled rule so forcibly enunciated in the Apex case, supra, that the Sherman Anti-Trust Act is not acting as a means of policing interstate commerce. The Williams' case, of course, was decided long before the Apex case and had the former followed the latter the conclusion reached might well have been different. However, in any event, the cases are distinguishable in many particulars. For example, the defendants in the Williams' case were guilty of resorting to unlawful and criminal acts and that is a charge, as aforesaid, cannot be made against the respondents in this case. Moreover, the conviction of the defendants in the Williams' case might well have been sustained, not on the Sherman Anti-Trust Act but on other statutes of the United States enacted under the commerce clause.

In the case of *Binderup vs. Pathe Exchange* (263 U. S. 291, 44 S. Ct. 96, 98 L. ed. 308), a number of motion picture producers and exhibitors combined and conspired to cut off an exhibitor from supply of films. That case is obviously too different from this case to require further comment.

Similarly, in the case of *Mitchell Woodbury Company vs. Albert Pick Barth Company, Inc.*, 41 Fed. 2d 148, there was a combination of competing corporations to deprive the

plaintiff of its customers. It is obvious that combinations of competitors make fertile ground for proceedings under the Anti-Trust Laws.

Numerous other decisions are cited in petitioners' brief but examination thereof makes it appear that the cases really relied on are those above mentioned, the other citations really being incidental.

CONCLUSION.

It is therefore submitted that the judgment entered by the Court below should be affirmed.

All of which is respectfully submitted.

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